FEDERAL ELECTION COMMISSION
Washington, DC 20463

Via First Class Mail

MAR 24 2015

Michael Henke

Lakeville, Minnesota 55044

RE: MUR 6922
Michael Henke

Dear Mr. Henke:

On January 12, 2012, the Federal Election Commission ("Commission") notified you of a *sua sponte* submission designated Pre-MUR 528 indicating potential violations of the Federal Election Campaign Act of 1971, as amended (the "Act") in connection with activity between May 2010 and January 2011. After reviewing the Submission, on March 3, 2015, the Commission found reason to believe that you knowingly and willfully violated 52 U.S.C. §§ 30118(a) and 30122 (formerly 2 U.S.C. §§ 441b(a) and 441f)) and 11 C.F.R. §§ 110.4(b)(1)(iii) and 114.2(e). The Commission voted to take no action as to your potential violation of 52 U.S.C. § 30104(b) (formerly 2 U.S.C. § 434(b)). Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519.

In order to expedite the resolution of this matter, the Commission has authorized the Office of the General Counsel to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Pre-probable cause conciliation is not mandated by the Act or the Commission's regulations, but is a voluntary step in the enforcement process that the Commission is offering to you as a way to resolve this matter at an early stage and without the need for briefing the issue of whether or not the Commission should find probable cause to believe that you violated the law.

If you are interested in engaging in pre-probable cause conciliation, please contact Kimberly Hart, the attorney assigned to this matter, at (202) 694-1650 or (800) 424-9530, within seven days of receipt of this letter. During conciliation, you may submit any factual or legal materials that you believe are relevant to the resolution of this matter. Please be advised, that as provided in Policy Regarding Self-Reporting of Campaign Finance Violations (Sua Sponte Violations), 72 Fed. Reg. 16,695, 16,698 (Apr. 5, 2007), although the Commission cannot disclose information regarding an investigation to the public, it can and does share information on a confidential basis with other law enforcement agencies. Because the Commission only enters into pre-probable cause conciliation in matters that it believes have a reasonable opportunity for settlement, we may proceed to the next step in the enforcement process if a mutually acceptable conciliation agreement cannot be reached within sixty days. *See* 52 U.S.C. § 30109(a), 11 C.F.R. Part 111 (Subpart A).

Conversely, if you are not interested in pre-probable cause conciliation, the Commission may conduct formal discovery in this matter or proceed to the next step in the enforcement process. Please note that once the Commission enters the next step in the enforcement process, it may decline to engage in further settlement discussions until after making a probable cause finding. If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed Statement of Designation of Counsel form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

In the meantime, this matter will remain confidential in accordance with 52 U.S.C. §§ 30109(a)(4)(B) and 30109(a)(12)(A) (formerly 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A)) unless you notify the Commission in writing that you wish the matter to be made public. We look forward to your response.

On behalf of the Commission,

Ann M. Ravel
Chair

Enclosures

Factual and Legal Analysis

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

MUR 6922

RESPONDENT: Michael Henke

I. INTRODUCTION

This matter was initiated pursuant to information ascertained by the Federal Election Commission ("Commission") in the normal course of carrying out its supervisory responsibilities.

II. FACTUAL SUMMARY

A. Background

ACA is an incorporated, not-for-profit trade association servicing businesses and individuals in the credit and collection industry.[1] ACPAC is its SSF, registered with the Commission as an unauthorized, qualified, non-party committee, and Rae Ann Bevington is ACPAC's current Treasurer (collectively, the "Committee"). Jean Cottington was the treasurer for ACPAC from April 15, 2008, to April 25, 2011, the period at issue.[2] The available information indicates that Cottington claims to have been unaware of Henke's transfer of corporate funds to ACPAC or the false information contained in ACPAC's disclosure reports.

Michael Henke was ACA's Vice President of Finance from 2004 until he was dismissed in April 2011 in connection with ACA's internal inquiry concerning this matter. In April 2008,

[1] *See* http://www/acainternational.org/ (last visited on Apr. 17, 2014).

[2] Between Bevington and Cottington, Patrick Morris served as ACPAC's Treasurer from April 23, 2012, to June 28, 2012, Adam Peterman served in that role from September 15, 2011, to April 23, 2012, and Valerie Hayes was Treasurer for ACPAC from April 25, 2011, to September 15, 2011.

ACPAC designated Henke as its Assistant Treasurer with the Commission.[3] In his Response, Henke states that he was unaware ACPAC had so designated him.[4] Henke also contends in his Response that he had no responsibility for ACPAC's reporting obligations with the Commission.[5] However, the available information indicates that Henke was responsible for oversight of all financial accounting, but he could not specifically recall whether he consulted with ACPAC Treasurer Cottington prior to engaging in significant actions involving ACPAC's bank account.

The available information further indicates that Marilyn Cerini was ACA's Assistant Controller from March 2003 until her termination on September 29, 2010. In early 2010, among other things Cerini was responsible for certain internal bookkeeping functions related to the ACPAC bank account. Further, the available information indicates that, after her termination, in October 2010, ACA discovered that between January and May 2010, Cerini had improperly diverted $2,950 from the ACPAC account to personal accounts under her control.

B. ACA's Contributions to ACPAC Through Fictitious Disclosures

The discovery of Cerini's theft led Henke and other members of the accounting department to conduct a more comprehensive review of the Committee's records, which suggested that ACPAC's ledger reflected a surplus of $23,419 over ACPAC's bank balance.[6] The available information indicates that, in an apparent effort to bring the books into balance, ACPAC's ledger subsequently included an October 31, 2010, accounting entry reducing the

[3] *See* ACPAC, Amended Statement of Organization (Apr. 15, 2008) (referring to Henke as ACPAC's Assistant Treasurer).

[4] Henke Resp. at 1 (Jan. 24, 2012).

[5] *Id.*

[6] Henke Dep. at 73:11-:25, 74:1-:25, 75:1-:25.

ledger balance by $23,419. However, the available information does not indicate who made that entry. Notwithstanding that accounting reduction, on November 12, 2010, Henke sought to address the perceived imbalance by transferring $23,419 by wire from ACA's general treasury account to ACPAC's bank account.[7] Further, the available information indicates that, although the "apparent surplus" instigated the transfer of funds from ACA to ACPAC, there is no explanation for the apparently duplicative efforts to resolve the same imbalance.

In his Response, Henke asserted that a temporary consultant hired to help reconcile the ACPAC account after Cerini's embezzlement "thought a transfer of funds needed to be made from ACA International to ACPAC based upon his limited knowledge."[8] Henke's Response does not specifically address whether he made the transfer.[9] Henke subsequently claimed that he transferred the $23,419 from ACA's corporate account on the advice of Ray Mularie, who was hired to reconcile ACA's accounts and had concluded that ACPAC's funds had mistakenly been deposited into ACA's account.[10]

The available information indicates that Katelyn Pearsall, another ACA employee who Henke supervised, was present when Henke accessed ACA's account through its bank's website

7 Henke Dep. at 74:10-:25, 75:1-:25.

8 Henke Resp. at 1. The available information indicates that the temporary accountant was Ray Mularie who worked with ACA from late October 2010 through early December 2010 and with whom the Committee has had no contact since that time. Mularie worked primarily on reconciling bank and cash accounts. Further, the available information indicates that Mularie may not have had any special knowledge of the Act or Commission regulations and was unlikely to have been aware of restrictions relating to commingling corporate treasury funds and PAC funds.

In addition, the available information indicated that the three members of the accounting department who had access to the website through which the wire transfer would have originated were Henke, Pam Butera (Accounting Coordinator), and Katelyn Pearsall (Accounting Assistant). Therefore, Mularie, a temporary employee, lacked the access necessary to transfer the funds on his own.

9 Henke Resp. at 1-2.

10 Henke Dep. at 75:4-:25.

and transferred the funds to ACPAC. Henke also told her afterwards that the transfer had been made. She understood, based on what Henke told her, that the purpose of the transfer was to reconcile ACPAC's bank account balance with the cash-on-hand balance reported to the Commission in connection with ACPAC's disclosure reports, which appeared to be overstated by the same amount.

The available information indicates that, on November 12, 2010, the date of the transfer from ACA to ACPAC, Henke also instructed Pearsall and Michele Andrew, two accounting department employees who he supervised, to identify ACPAC donors falsely as the original source of the funds that ACA transferred to ACPAC. Further, the available information indicates that Henke instructed them first to identify ACPAC contributors who had not met their annual aggregate contribution limit of $5,000, and then to record fictional contributions from regular or frequent contributors on that list in amounts that would not exceed those individuals' annual aggregate contribution limits.

These employees falsified seven such contributions in the manner Henke described, accounting for $22,399 in alleged contributions along with an eighth contribution for $250 falsely attributed to ACPAC contributor Debra Bates days later, but the total amount fell short of the $23,419 transferred from ACA by $770. Consequently, they recorded an additional $770 in the form of unattributed cash contributions to balance the figures. Henke acknowledged his responsibility for associating contributor names with false contributions. He testified that he instructed the two employees to "temporarily assign names" to the $23,419 in contributions transferred to ACPAC's account for disclosure reporting purposes.[11] He explained that he sought to "buy . . . time to get the bank accounts reconciled and these [reports] were going to be

[11] Henke Dep. at 94:18-:25, 95:1-25, 96:1-:6.

re-filed anyway."[12] He also admitted that he was aware that false contributions would consequently be included among the Committee's disclosures in a report filed with the Commission, but anticipated disclosing accurate information later in the reports.[13]

In addition to seeking to disguise the true nature of the transfer from ACA to ACPAC generally, Henke also sought to conceal the activity internally. The available information indicates that Henke instructed other staff members not to discuss or reveal to Cottington details related to the prohibited transfer. Henke conceded as much in his testimony, stating that he did not inform Cottington about the transfer and instructed Andrew not to do so either until they "got it figured out."[14]

On December 2, 2010, then-Treasurer Cottington filed the original 2010 Post-General Election Report that itemized $22,649 in contributions that Henke and his staff fabricated, as well as $770 in cash contributions among other un-itemized cash contributions disclosed in that filing.[15]

After Cottington filed the 2010 Post-General Report, Henke determined that the perceived imbalance in ACPAC's books stemmed from an accounting irregularity and that no $23,419 shortfall ever existed.[16] Thus, to remedy the discrepancy in the books that resulted from the previous "remedial" transfer, on January 20, 2011, the available information indicates that

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[12] *Id.* at 94:23-:25, 95:1-:3.

[13] *Id.* at 94:18-:25, 95:1-:25, 96:1-:3.

[14] Henke Dep. at 79:8-:25, 80:1-:13.

[15] *See* ACPAC, 2010 Post-General Report (Dec. 2, 2010).

[16] Henke Dep. at 75:4-:8. According to Henke, when it became apparent that ACPAC could not match any incoming contributions to the transfer amount, he had no choice but to reverse the transfer. *Id.* at 75:4-:8. Henke stated that he must have informed other ACA corporate officers of the transfer, but could not identify any person whom he notified. *Id.* at 79:16-:25, 80:1-:2.

Henke directed staff to issue a check from ACPAC to ACA payable in the amount of $23,419 and backdated to November 12, 2010 — the date of the initial transfer. The correlating ACPAC ledger entry reflecting that return of funds also was backdated to November 12, 2010.

On January 31, 2011, after Henke reversed the initial unlawful transfer, Cottington filed the 2010 Year-End Report for ACPAC, which falsely described the return of those funds to ACA as "Refunds of Contributions to Persons Other Than Political Committees" in the amount of $23,419 to the contributors who Henke and his staff had associated with the spurious contributions.[17] In fact, the available information indicates that ACPAC issued no such refunds to any of the putative contributors and that Henke concealed information from Cottington that would have alerted her to the falsity of those reports.

On February 7, 2011, the Committee amended its 2010 Post-General Report to reflect seven of the eight falsified contributors that the original 2010 Post-General Report had identified.[18] Also on February 7, 2011, the Committee filed an Amended 2010 Year-End Report disclosing the refund of all eight falsified contributors totaling $22,649 as well as the $770 in cash contributions.[19] The available information indicates that Henke may have filed the February 7, 2011 Amended 2010 Post-General Report and Year-End Report electronically on his own initiative as the Assistant Treasurer of ACPAC using her Commission password and without notifying her or providing them to her for review prior to filing them with the

[17] *See* ACPAC, 2010 Year-End Report (Jan. 31, 2011).

[18] ACPAC, Amended 2010 Post-General Report (Feb. 7, 2011).

[19] ACPAC, Amended 2010 Year-End Report (Jan. 31, 2011). The available information does not indicate why the February 7, 2011, Amended 2010 Post-General Report failed to include one of the false contributions — a $2,500 contribution falsely attributed to Darin Bunton — or $100 of the previously reported cash contributions, while the Amended 2010 Year-End Report reflects refunds of the entire $23,419 amount of the transfer.

Commission. Henke disputes that claim, asserting that Dan Puhl — a temporary consultant hired to assist the Committee in reconciling its accounts[20] — filed them.[21]

III. LEGAL ANALYSIS

The Act prohibits corporations from making contributions to a federal political committee (other than independent expenditure-only political committees)[22] and further prohibits any officer of a corporation from consenting to any such contribution by the corporation.[23] The Act also provides that "no person shall make a contribution in the name of another person."[24] That prohibition extends to knowingly permitting one's name to be used to effect the making of a contribution in the name of another or, under the Commission's implementing regulation, to knowingly helping or assisting "any person in making a contribution in the name of another."[25] The Commission has explained that the provisions addressing those who knowingly assist a

[20] *See* Henke Dep. 42:7-:13, 82:3-:7. The available information indicates that ACA's first contact with Puhl appears to have been on October 13, 2010, and that he visited ACA's main office on several occasions afterwards. In addition, The Committee has not had any contact with Puhl since mid-March 2011.

[21] Henke Dep. at 84:16-:25, 85:1-:23. Further, Henke says that they did not show their work to Cottington and that Puhl filed the amended reports using Cottington's signature. *Id.* The available information indicates that Puhl may have assisted with the preparation of ACPAC's disclosure reports and may have submitted some of them using Cottington's password. But because neither Cottington, Henke, nor Puhl remained employed by ACA when it conducted its internal review, the Commission is unable to conclude with certainty whether Puhl was otherwise involved in the effort to falsify contribution records or in fact filed the amended reports, as Henke contends. Even if Puhl filed those amended disclosure reports as Henke claims, he would not be liable under the Act for a reporting violation because he was not a treasurer. Further, whatever Puhl's role in filing the amendments on February 7, 2011, the available information supports a conclusion that Henke directly authorized and participated in the effort to conceal the illegal transfers of funds between ACA and ACPAC as false contributions and false refunds to contributors.

[22] *See, e.g.*, Advisory Op. 2010-11 (Commonsense Ten) (concluding that corporations and unions may make unlimited contributions to independent-only political action committees because "independent expenditures do not lead to, or create the appearance of *quid quo pro* corruption") (citing *Citizens United v. FEC*, 558 U.S. 310, 359 (2010)) (emphasis in original).

[23] 52 U.S.C. § 30118(a) (formerly 2 U.S.C. § 441b(a)); 11 C.F.R. § 114.2(b), (e). On September 1, 2014, the Act was transferred from Title 2 to new Title 52 of the United States Code.

[24] 52 U.S.C. § 30122 (formerly 2 U.S.C. § 441f); 11 C.F.R. § 110.4(b)(i).

[25] 11 C.F.R. § 110.4(b)(1)(ii), (iii).

conduit-contribution scheme apply to "those who initiate or instigate or have some significant participation in a plan or scheme to make a contribution in the name of another."[26]

Finally, the Act prescribes additional monetary penalties for violations that are knowing and willful.[27] A violation of the Act is knowing and willful if the "acts were committed with full knowledge of all the relevant facts and a recognition that the action is prohibited by law."[28] But this does not require proving knowledge of the specific statute or regulation the respondent allegedly violated.[29] Instead, it is sufficient to demonstrate that a respondent "acted voluntarily and was aware that his conduct was unlawful."[30] This may be shown by circumstantial evidence from which the respondents' unlawful intent reasonably may be inferred.[31] For example, a person's awareness that an action is prohibited may be inferred from "the elaborate scheme for disguising . . . political contributions."[32]

In Henke's sworn testimony, he admitted that he authorized the transfer of funds, but claimed a consultant advised him to do it. Whether he acted on another's advice or not, Henke's

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[26] Explanation & Justification for 11 C.F.R. § 110.4, 54 Fed. Reg. 34,105 (Aug. 17, 1989) ("E&J").

[27] *See* 52 U.S.C. § 30109(a)(5)(B), 30109(d) (formerly 2 U.S.C. §§ 437g(a)(5)(B), 437g(d)).

[28] 122 Cong. Rec. 12,197, 12,199 (May 3, 1976).

[29] *United States v. Danielczyk*, ___ F. Supp. 2d ___, 2013 WL 124119, *5 (E.D. Va. Jan. 9, 2013) (quoting *Bryan v. United States*, 524 U.S. 184, 195 & n.23 (1998) (holding that, to establish a violation is willful, government needs to show only that defendant acted with knowledge that conduct was unlawful, not knowledge of specific statutory provision violated)).

[30] *Id.* (citing jury instructions in *United States v. Edwards*, No. 11-61 (M.D.N.C. 2012), *United States v. Acevedo Vila*, No. 08-36 (D.P.R. 2009), *United States v. Fieger*, No. 07-20414 (E.D. Mich. 2008), and *United States v. Alford*, No. 05-69 (N.D. Fla. 2005)).

[31] *Cf. United States v. Hopkins*, 916 F.2d 207, 213 (5th Cir. 1990) (quoting *United States v. Bordelon*, 871 F.2d 491, 494 (5th Cir. 1989)). *Hopkins* involved a conduit contributions scheme, and the issue before the Fifth Circuit concerned the sufficiency of the evidence supporting the defendants' convictions for conspiracy and false statements under 18 U.S.C. §§ 371 and 1001.

[32] *Id.* at 214-15. As the *Hopkins* court noted, "It has long been recognized that 'efforts at concealment [may] be reasonably explainable only in terms of motivation to evade' lawful obligations." *Id.* at 214 (quoting *Ingram v. United States*, 360 U.S. 672, 679 (1959)).

transfer of corporate funds into the Committee's account resulted in his consenting to the making of a prohibited contribution. Therefore, the Commission found reason to believe that Michael Henke violated 52 U.S.C. § 30118(a) (formerly 2 U.S.C. § 441b) and 11 C.F.R. § 114.2(e).

Moreover, Henke sought to conceal the Committee's receipt of the prohibited contribution. He directed his subordinates to create false donor records and provided detailed instructions about the steps they were to take to identify those donors and to conceal the transfer. Henke also acknowledged in his sworn deposition that he intended to submit the false information to the Commission and to amend the reports later. Henke's intentional efforts to disguise the transaction, through the use of fabricated donors, with the knowledge that doing so would cause ACPAC to file false disclosure reports that would require later amendments, indicates that Henke knowingly assisted in making a prohibited corporate contribution in the names of others and acted with an appreciation that doing so was prohibited. Accordingly, the Commission found reason to believe that Michael Henke knowingly and willfully consented to the making of a prohibited contribution in violation of 52 U.S.C. § 30118(a) (formerly 2 U.S.C. § 441b(a)) and 11 C.F.R. § 114.2(e) and that he knowingly and willfully caused prohibited corporate contributions to be made in the names of others in violation of 52 U.S.C. § 30122 (formerly 2 U.S.C. § 441f) and 11 C.F.R. §§ 110.4(b)(1)(iii).

Despite Henke's significant involvement in assembling and filing ACPAC's inaccurate reports with the Commission, we recommend that the Commission take no action as to Henke in connection with ACPAC's reporting violation under 52 U.S.C. § 30104(b) (formerly 2 U.S.C. § 434(b). The Commission's implementing regulation provides that an assistant treasurer assumes the duties and obligations of the treasurer in the event of the treasurer's temporary or

permanent vacancy.[33] But here no temporary or permanent treasurer vacancy occurred — Cottington was the named Treasurer and appears to have fulfilled some of the duties of Treasurer during the relevant period, such as signing and filing the 2010 Post-General and Year-End reports for the Committee. The Commission therefore voted to take no action as to Henke's potential violation of 52 U.S.C. § 30104(b) (formerly 2 U.S.C. § 434(b)).[34]

[33] 11 C.F.R. § 102.7(a).

[34] The Act and Commission regulations do not provide for the direct liability of an assistant treasurer where a committee has designated a treasurer. The Commission has in past matters approved reason to believe findings against individuals other than treasurers for filing false disclosure reports when the individuals in fact acted in the absence of the treasurer and in a capacity tantamount to that of the treasurer, relying on a *de facto* theory of liability in such cases. *See* Commission Certification ¶ 3, MUR 5652 (Terrell for Senate) (Apr. 5, 2005) (approving reason to believe findings against an assistant treasurer in her personal capacity based on the theory that she recklessly failed to fulfill duties imposed on treasurers by the Act and regulations which gave rise to the Committee's violations in the treasurer's absence); Commission Certification ¶ 2, MUR 5652 (Terrell for Senate) (May 1, 2007) (taking no further action as to the assistant treasurer); General Counsel's Report #2 at 8-9, MUR 5610 (Dole North Carolina Victory Committee) (approving reason to believe findings against an assistant treasurer for knowing and willful recordkeeping violations where he acted as a *de facto* treasurer in treasurer's absence); *see also* 52 U.S.C. § 30102(a) (formerly 2 U.S.C. § 432(a)) ("No expenditure shall be made . . . without the authorization of the treasurer *or his or her designated agent*." (emphasis added)); 11 CFR § 102.7(a) (permitting the designation of an assistant treasurer)). The Commission decided to take no action as to Henke, however, for the reason stated above: notwithstanding Cottington's apparently minimal engagement in making the filings at issue and Henke's apparent concealment of his activities, Cottington remained ACPAC's designated Treasurer throughout the relevant period and Henke had not assumed the role on a *de facto* basis in her absence.